TAN WEE CHOON v. ONG PECK SENG & ANOR.

[O.C.J. (Wan Yahya J.) March 7, 1985]

[Malacca – Civil Suit No. 25 of 1983]

Tort – Trespass – Defence of equitable right of way under common law – Whether applicable – Specific Relief Act 1950, s. 41 – Civil Law Act, 1956, ss. 3(1) & 6 – National Land Code, ss. 282 to 288.

Land Law – Equitable rights and common law no longer available since passing of Civil Law Act 1956, ss. 3(1) & 6 and National Land Code, ss. 282 to 288.

Common Law – Circumstances under which common law and equitable rights not available – Civil Law Act 1956, ss. 3(1) & 6 – National Land Code, ss. 282 to 288.

This case concerns trespass and its damages. The plaintiff, desirous of carrying on his business as a second-hand goods dealer, bought land No. 37 town area 29 Bandar Malacca on December 15, 1981. Right in the centre of the plaintiff's land from the rear portion to the front main road there existed a path used by the first and second defendants as access to their house. The plaintiff fenced the entire area of his land but the fence was forcibly pulled down by the first defendant who continued to use the path for access of his vehicles to his house. The plaintiff claimed that the defendant threatened his workmen who were erecting the fences with the use of force. He therefore sought this Court's remedy for a declaration that he is entitled to the exclusive possession and enjoyment of the land; an injunction to restrain the defendants whether by themselves or by their servants or agents from trespassing on the said land; an Order that the defendants do forthwith pull down and demolish the wooden shed erected on the plaintiff's land, damages and costs.

The defendants did not dispute the facts but contended that the plaintiff is not entitled to the orders sought. They contended that (i) the plaintiff must prove damages to establish trespass and (ii) the defendants have acquired an equitable right of way to use the path through unobstructed use of the same over some 40 years.

Held: (1) damages need not be proved to establish trespass. Section 41 of the Specific Relief Act, 1950, states in very clear terms that any interested person to any property may obtain an order against any person claiming or interested to deny his title or right to land;

(2) as the defendants' counsel did not elaborate on the nature of the right his client is relying on, it is difficult for this Court to determine under which category of right or interest the defendants' claim would fall into. It is true that prior to 1965 rights of way could be acquired through easement, prescription, lost modern grant or by way of necessity but these common law and equitable rights previously procurable in this country are no longer available since the passing of sections 3(1) and 6 of the Civil Law Act, 1956 and the National Land Code, 1965;

(3) there shall be an order in terms of prayers 1 and 2. A sum assessed at $200.00 per month for damages for period January 1, 1982 until March 9, 1983 appears to be fair and equitable. Costs to be paid by the defendants.

Cases referred to:

(1) *Datin Siti Hajar* v. *Murugasu* [1970] 2 M.L.J. 153.

(2) *United Malayan Banking Corporation Berhad* v. *Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 M.L.J. 87, 90.

CIVIL SUIT.

Thara Singh Sidhu for the plaintiff.

F. H. D'Cruz for the defendants.

Cur. Adv. Vult.

Wan Yahya J. : On December 15, 1981 the plaintiff who was desirous of carrying on his business as a second-hand goods dealer bought land No. 37 town area 29 Bandar Malacca. Towards the rear of the plaintiff's left adjacent lot as one faces the road stands the house of the second defendant as well as a cluster of other houses. The house built by the second defendant is maintained by payment of ground rent to the owner of that lot. The first defendant, the son of the second defendant, Ong Peck Seng, came to live with his father in that house some time in 1979 when he commenced to do the same business as the plaintiff. The defendant's house partly encroached on the plaintiff's land. However, as this part of the building had been demolished this matter no longer forms the issue in this case. Right in the centre of the plaintiff's land from the rear portion to the front main road there existed a path used by the first and second defendants as access to their house.

Some time after taking possession of his newly purchased lot the plaintiff with a view to commencing his second-hand dealer's business fenced the entire area but the fence was forcibly pulled down by the first defendant who continued to use the path for his vehicles access to his house. The plaintiff claims that the defendant threatened his workmen who were erecting the fences with the use of force. He therefore seeks this Court's remedy for a declaration that he is entitled to the exclusive possession and enjoyment of the land; an injunction to restrain the defendants whether by themselves or by their servants or agents from trespassing on the said land; an Order that the defendants do forthwith pull down and demolish the wooden shed erected on the plaintiff's land, damages and costs.

The defendants did not dispute the facts but disclaim that the plaintiff is entitled to the Orders he seeks for two reasons. First, they contend that

the plaintiff had failed to prove that their continued use of the plaintiff's land constitutes trespass. To establish trespass, according to them, the plaintiff must prove damages. Secondly, the defendants also claim that they have acquired an equitable right of way to use the path through unobstructed use of the same over some 40 years.

On the first line of defence, I find it difficult to respond to the suggestion that damages must be proved before the applicant succeeds in his prayer for a declaratory order. Section 41 of the Specific Relief Act 1950 states in very clear terms that any interested person to any property may obtain an order against any person claiming or interested to deny his title or right to land. The plaintiff in this case is an undisputed registered owner of the land and all he need do, to successfully move this court into issuing the orders prayed, is to show that the defendants' action amounted to a denial of his indivisible right over his property. It is unconscionable to accept that the defendants' continuing use of this passage, driving their vehicles up and down the plaintiff's land, tearing down the fences and preventing the plaintiff from carrying on his proposed business can mean otherwise than a denial of the latter's right to enjoy a peaceful occupation of his own land. Trespass to land unlike criminal trespass is completed once a person wrongfully, albeit peaceably, intrudes into the land in the possession of another, even where no damage is done. Trespass to land covers all unlawful entry and includes taking possession, pulling down or destroying anything permanently fixed to the land. The following passage on what constitutes trespass to land is found in *Halsbury's* Laws of England (3rd ed.), Vol. 38 at page 739:

"Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no actual damage is done. A person trespasses upon land if he wrongfully sets foot on, or rides or drives over, it, or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or, it seems, if he erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water from another's land, or sends filth or any injurious substance which has been collected by him on his own land on to another's land."

Even if damages need be proved, there is in my finding sufficient evidence of it in our present case. Tearing down fence, threatening workers engaged in erecting it and driving vehicles up and down right in the middle of another man's land and depriving the owner of his right to conduct his business on his land, in my opinion, constitute sufficient damage to the landowner.

The second line of defence relied upon by the defendants is one which his counsel briefly mentioned as equitable right. However, as he did not elaborate on the nature of the right his client is relying on, it is difficult for this court to determine under which category of right or interest the defendant's claim would fall into. It is true that prior to 1965 rights of way could be acquired through easement, prescription, lost modern grant or by way of necessity but these common law and equitable rights previously procurable in this country are no longer available since the passing of sections 3(1) and 6 of the Civil Law Act, 1956 and the National Land Code, 1965. Section 3(1) of the Civil Law Act provides:

"Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall –

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on April 7, 1956;

. . . .

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

It is obvious that the above section is a saving provision intended to preserve the remedy for matters not provided for by statute. It is equally ostensible that these rights arising out of common law or the rules of equity will cease to function the moment parliament enacts the relevant legislation relating to comparable rights. This intention to preclude the continued importation of common law and equitable rights into this country is further substantiated in section 6 of the Civil Law Act which reads:

"Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein."

In *Datin Siti Hajar* v. *Murugasu*[1] Syed Agil Barakbah J. went into elaborate discussion on the effect of this legislation on common law and equitable rights. Further authority is to be found in the Privy Council case of *United Malayan Banking Corporation Berhad* v. *Pemungut Hasil Tanah, Kota Tinggi*[2] where their Lordships expressed the opinion on land tenure as follows:

". . .laws relating to the tenure of land must, applying the ordinary and natural meaning of the words, embrace all rules of law which govern the incidents of the tenure of land. . ."

Parallel legislation on rights and interest incidental to land tenure has been expressly provided for in sections 282 to 288 under Chapter 17 of the National Land Code by way of registration. Any such right was never registered by the defendant and therefore their claim under this limb must fail. In any event the 1st defendant's right of way commenced only after 1979.

A further argument based on the equitable maxim "He who comes to equity must come with clean hands" was raised by counsel. In my considered view it is the defendants rather than the plaintiff who appeared to have transgressed this equitable right. Their forceable insistence in using this path over another man's land when other access be it less convenient are available through their own landlord's land, does not in my opinion reflect conscionable or moral behaviour. Likewise the objection on this point fails.

There shall be an Order in terms of prayers 1 and 2. Prayer 3 is rendered redundant by compliance prior to this hearing. I make no order thereon. Prayer 4 on damages has neither been raised nor argued to this Court's satisfaction. A claim of $400.00 per month ground rental on a small piece of land is certainly exorbitant. To my mind, a sum of $200.00 per month appears to be fairer and equitable.

The defendants shall pay to the plaintiff damages to be assessed on this sum for the period commencing two weeks from the date of registration of the land *i.e.* January 1, 1982 until March 9, 1983 when an order of interim injunction was made by this Court.

The defendants shall also pay the costs of this suit.

Order accordingly.

Solicitors: *Thara Singh Sidhu; Tay Leong Siak & Co.*

ZAKARIA BIN CHE SOH v. CHOOI KUM LOONG & ANOR.

[A.C.J. [Edgar Joseph Jr. J.) March 12, 1985 & April 3, 1985]

[Ipoh – Perak Civil Appeal No. 16 of 1982]

Tort – Motor accident – Vehicle driven by employee for his own private purpose during collision – Whether employer vicariously liable – Test applied.

Employment – Vicarious liability – Vehicle driven by employee for his own private purpose during collision – Whether employer vicariously liable – Test applied.

The main issue in this case was whether the learned President was right in exempting the Government of Malaysia from vicarious liability in an action against it by an injured party involving a motor vehicle allegedly driven by its servant or agent (the defendant driver). The sole question before the court was whether at the moment of collision, the defendant driver was using the vehicle for his own private purpose, so as to constitute a breach in his employment as driver, thus relieving the Government from all liability.

In his reasons for decision the learned President held the issue central to this appeal in favour of the Government because he found that the defendant driver (Zakaria the appellant) "though driving the department's official car with the permission of the head of department ... was actually on his way home for lunch and was not within his employment ..."

Held: (1) the learned President's finding that the defendant driver was on his way home to have lunch was contrary to the evidence before him;

(2) whether the defendant driver was, at the material time, on his way "to unload equipment for field work" or to "unload belongings carried while on duty" the important thing to note is that he did so with the express authority of his head of department. It was thus as plain as pikestaff that he was acting in the discharge of his duties. The Government was thus vicariously liable in accordance with the principles enunciated in the cases cited;

(3) regard being had to the circumstances of this case, even if the defendant driver was on his way home for lunch at the time of collision, as found by the learned President, the Government would still be vicariously liable;

(4) an act though strictly not one which an employee is required by his employment to perform is still to be regarded as within the sphere of his employment if it is a reasonable or necessary thing to do under all the circumstances unless it has been expressly or impliedly excluded from his employment. The test is whether the manner of doing the act was not so far remote from anything contemplated by either party as to take the act out of the employment;

(5) the appeal would therefore be allowed, the order of the learned President dismissing the claim against the Government would be set aside and substituted in its place judgment for the plaintiff in the sum of $9,082.86, these being agreed damages;

(6) the defendant driver would have to pay the costs